SUPREME COURT OF THE UNITED STATES.

No. 292.

CORNELIUS K. GARRISON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.*

To the Honorable, the Judges of the Court of Claims:

The petition of Cornelius K. Garrison of the State of New York, and a loyal citizen of the United States, respectfully showeth:

That your petitioner, to wit, at the city of New York, on the seventh day of October, A. D. eighteen hundred and sixty-one, entered into a contract with the United States, in writing, by its duly authorized and legally empowered agent, Major General Benjamin F. Butler, who was authorized, in writing, by the Secretary of War, with the approval of the President of the United States, to raise, organize, arm, and equip six thousand troops for the use and service of the United States in the war then existing, a copy of which contract is hereunto annexed, marked A, and is made a part of this petition, wherein your petitioner promised and agreed with the United States, and became legally holden for its performance, to sell and deliver to the United States, at the city of New York, such number, not exceeding six thousand, as said Butler might determine, of Minie rifles of the Leige pattern, with sabre bayonets and all appendages complete, in such order and of such construction as shall pass the inspection of an ordnance officer of the United States army, within fifteen days after the date of said contract.

And the United States, on its part, in consideration of the promise and agreement of your petitioner, by its duly constituted and legally empowered agent as aforesaid, promised and agreed to pay your petitioner, and became holden therefor to pay to your petitioner, for each and every rifle of the pattern aforesaid, with the bayonet aforesaid, and appendages complete, duly inspected as aforesaid, and delivered as aforesaid, the sum of twenty-seven dollars, or such less sum as the Ordnance Department may have paid for guns like in quality and description, or contracted to pay for to said Garrison; such payments to be made forthwith, upon the delivery and inspection of said arms, by an account duly certified by said Butler to the Ordnance Department, with a copy of said contract annexed, or in cash, at the option of said Butler.

2

And it was further agreed between the contracting parties aforesaid, within the time limited and before the delivery of the arms, at the instigation and solicitation of the United States, and for its special benefit, that the so-called long Enfield rifle, with bayonets of the triangular pattern, might be substituted for the Minie rifles and sabre bayonets, at the same value, and upon the same conditions of payment, which was accepted by your petitioner.

And your petitioner alleges, that within the fifteen days mentioned, and at the city of New York, he delivered, and caused to be delivered to the United States, six thousand rifles of the long Enfield pattern, with the triangular bayonet attached, complete in all their appendages, which were duly inspected by an ordnance officer of the United States army, and were received and accepted by the United States

without objection, in full performance of the contract aforesaid, and appropriated to its use.

And the said Butler thereupon caused to be delivered, and did deliver, to your petitioner, formal and regular vouchers, duly and properly certified by competent officers, for the contract price of twenty-seven dollars for each of the rifles, bayonets, and appendages complete, as aforesaid, amounting to the sum of eighty-seven thousand one hundred and fifty dollars, with the necessary boxes for safely keeping and transporting said rifles included. And your petitioner alleges, that at the time of making said contract, the Ordnance Department had not paid less than the sum of twenty-seven dollars for rifles like in quality and description, and had even paid a higher sum, and could not procure them at that price, for they were not to be had in the country. And your petitioner further alleges, that the contract price of twenty-seven dollars a piece was paid to him by the United States for twenty-eight hundred of the guns delivered, and for the remaining thirty-two hundred only twenty dollars a piece has been paid your petitioner, which was not received or accepted by him in full payment; whereby there remains now, justly due and
3 owing to your petitioner from the United States on its contract aforesaid, the sum of twenty-two thousand and four hundred dollars, with lawful interest thereof from the day specified and named in said contract payment was to be made; upon which day the United States made default in payment without cause, regular evidence of the indebtedness being made and presented, and payment demanded from proper officers, which was refused, whereby the United States became liable, and in consideration thereof promised to pay your petitioner the sum last named, and legal interest thereon.

And your petitioner alleges, that the alleged order of the Assistant Secretary of War, reducing the price to be paid for said rifles from twenty-seven to twenty dollars, was illegal, unauthorized, arbitrary, and unjust, and never consented to or acquiesced in by your petitioner; that he claims, as he has a right to, the contract price for the rifles delivered, for which he brings this complaint.

A true copy of the vouchers for the thirty-two hundred Enfield rifle muskets, delivered to Quartermaster Strong, is hereunto attached, marked B, and is made a part of this petition.

T. J. D. FULLER.
Solicitor for Claimant.

Solicitor's post-office address, Washington City, D. C.
Claimant's post-office address, New York City.

DISTRICT OF COLUMBIA,
Washington, D. C., ss:

JANUARY 30, 1866.

Personally appeared Thomas J. D. Fuller, the Solicitor in the above petition in behalf of the claimant, and made oath, that from his best knowledge and information and belief, the matters and things set forth in said petition are just and true; that no transfer or assign-

ment of said claim, or any part thereof, or any interest therein, has been made; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets.

T. J. D. FULLER.

Sworn and subscribed before me, this 30th day of January, A. D. 1866.

N. CALLAN,
Justice of the Peace.

4 [Copy.]

"*A.—Contract.*"

Memorandum of a contract made by and between the United States and Cornelius K. Garrison, of the State of New York, witnesseth:

That said Garrison agrees to sell and deliver to the United States, at the city of New York, such a number, not exceeding six thousand, as Major General B. F. Butler may determine, of Minie rifles of the Leige pattern, with sabre bayonets and all appendages complete, in such order and of such construction as shall pass the inspection of an ordnance officer of the United States army, within fifteen days of the date hereof. And the United States contracts and agrees to pay for each and every of said rifles, with sabre bayonets and appendages complete, as shall pass such inspection, the sum of twenty-seven dollars, or such less sum as the Ordnance Department may have paid for guns like in quality and description, or contracted to pay for to said Garrison; such payment to be made forthwith upon the delivery and inspection of said arms, by an account duly certified by said Butler to the Ordnance Department, with a copy of this contract annexed, or in cash, at the option of said Butler. If said Garrison shall refuse or neglect to deliver said arms within the time specified, then said Butler is at liberty to procure elsewhere the same number of arms, and to deduct the difference in value, and the cost to the United States, between the arms herein contracted for and those purchased by him, from any moneys due to said Garrison from the United States, or to charge said Garrison with the same amount.

Witness the hand of said Garrision, and the signature of said Butler, in behalf of the United States, this seventh day of October, in the year eighteen hundred and sixty-one.

BENJ. F. BUTLER,
Maj. Gen. U. S. A., for the United States.
C. K. GARRISON.

It is agreed by the United States to accept from C. K. Garrison, the contractor, the long Enfield rifles, with bayonet of the triangular pattern, in place of the sabre bayonet, upon the value conditions as are herein specified.

B. F. BUTLER
Maj. Gen. Com'd'g.

5 B.

Copy of vouchers.

The United States to C. K. Garrison, Dr.

Pur. arms, &c., for volunteers and regulars.—Date of purchase, December 11, 1861.

For thirty-two hundred (3,200) Enfield rifle muskets, at $27 each	$86,400
For 300 arm chests, at $2 50	750
	$87,150

$64,750 paid. (See statement in certificate below.)

Remarks.

For use in General Butler's division.

I certify, on honor, that the above account is correct and just; that I purchased the articles above enumerated of the said C. K. Garrison at the price therein charged, amounting to eighty-seven thousand one hundred and fifty dollars, and that I have not paid the account, orders having been received from the Secretary of War. I have paid twenty dollars each for these muskets, (see below;) the contract price, however, being twenty-seven dollars each.

(Signed) GEO. C. STRONG,
Maj., A. A. Gen., and Ordnance Officer.

Received, at Boston, the 11th of December, 1861, of Major Geo. C. Strong, A. A. General and Ordnance Officer United States Army, the sum of sixty-four thousand seven hundred and fifty dollars.

(Signed) C. K. GARRISON.

(Duplicate.)

6 United States Court of Claims.

C. K. GARRISON
vs.
THE UNITED STATES. } No. 2,202.

And now, on this 8th day of January, 1867, the petitioner in the above-entitled cause, under the general order of Court, takes leave to amend his original petition; and, in amendment of the same, avers that he, at all times has borne true faith and allegiance to the government of the United States; that he has taken no part in the late rebellion against the government of the United States, nor has he given any aid or encouragement to the same.

C. K. GARRISON.
By his Solicitor, T. J. D. FULLER.

On this, 8th day of January, A. D. 1867, before me, personally appeared T. J. D. Fuller, and made solemn oath that the matters and things stated in the above-amended petition, to the best of his knowledge and belief, are true.

Sworn before me, this 8th day of January, 1867.

N. CALLAN,
Notary Public.

Plea.

7 In the U. S. Court of Claims.—October term, A. D. 1866.

THE UNITED STATES
ats.
CORNELIUS K. GARRISON.

And the said defendants, by John J. Weed, their Solicitor, come and make answer to the petition of the claimant on file herein; and not confessing the same, or any part thereof, doth hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of said petition as sets forth and avers that the United States is indebted to said claimant in the sum of twenty-two thousand four hundred dollars, the defendants say that they are not indebted to said claimant in said sum of money, nor any part thereof.

JOHN J. WEED,
Assistant Solicitor for the United States.

8 In the Court of Claims.

C. K. GARRISON
vs.
THE UNITED STATES. } No. 2,202.

And now, to wit: 25th March, 1867, the Court, upon due consideration of the premises, do order, adjudge, and decree, that the said claimant take nothing by his suit, and that the said petition be dismised.

BY THE COURT.

In the Court of Claims.—May 20th, 1867.

C. K. GARRISON
vs.
THE UNITED STATES.

Mr. Fuller, counsel for the claimant, filed in this case a petition for an appeal to the Supreme Court of the United States from the judgment entered therein, on the 25th of March last, whereupon it was ordered that the petition be allowed.

BY THE COURT.

9 In the United States Court of Claims.—October term, A. D. 1866.

CORNELIUS K. GARRISON
v.
UNITED STATES. } No. 2,202.

The Court find the following state of facts from the evidence adduced on the trial of said cause. That Major Gen'l B. F. Butler, was authorized (on the sixth day of September, A. D. 1861, by the written authority of the Secretary of War, endorsed and approved by the President of the United States, in the following words:

"WAR DEPARTMENT, *September* 6, 1861."

"Major Gen'l B. F. Butler, is hereby authorised to raise, organise, arm, uniform, and equip a volunteer force for the war, in the New England States, not exceeding six (6) regiments, of the maximum standard, of such arms, and in such proportions, and in such manner, as he may judge expedient; and for this purpose, his orders and requisitions on the Quartermasters, Ordnance, and other Staff Departments of the Army, are to be obeyed and answered, provided the cost of such recruitment, armament, and equipment, does not exceed in the aggregate, that of like troops now or hereafter raised for the service of the United States."

SIMON CAMERON,
Secretary of War.

Approved, September 12th.

A. LINCOLN.)

10 to raise, organize, and equip the number of troops specified.

That Gen'l Butler applied to the Ordnance Bureau for arms for equiping his expedition, which it could not furnish. Neither could the purchasing ordnance officer at New York supply him, as the arms at that time, could not be procured.

That learning by accident six thousand Endfield's were either in the city of New York, or on their way there, destined for Gen'l Fremont, that he upon the promise of ready payment in cash, induced Mr. Garrison, the claimant, to allow him to have them, and on the seventh day of October, A. D. 1861, entered into a written contract with him, in the following words:

"Memorandum of a contract made by and between the United States and Cornelius K. Garrison, of the State of New York," witnesseth:

"That said Garrison agrees to sell and deliver to the United States, at the city of New York, such a number, not exceeding six thousand, as Maj. Gen'l Butler may determine, of Minie Rifles of the Liege pattern, with sabre bayonets and all appendages complete, in such order, and of such construction as shall pass the inspection of an ordnance officer of the United States army, within fifteen
11 days of the date hereof. And the United States contracts and agrees, to pay for each and every of said rifles, with

sabre bayonets and appendages complete, as shall pass such inspection, the sum of twenty-seven dollars, or such less sum as the Ordnance Department may have paid for guns like in quality or description, or contracted to pay for, to said Garrison; such payment to be made forthwith upon the delivery and inspection of said arms, by an account duty certified by said Butler to the Ordnance Department, with a copy of this contract annexed, or in cash, at the option of said Butler. If said Garrison shall refuse or neglect to deliver said arms within the time specified, then the said Butler is at liberty to procure elsewhere the same number of arms, and to deduct the difference in value and the cost to the United States, between the arms herein contracted for and those purchased by him, from any moneys due to said Garrison from the United States, or to charge said Garrison with the same amount.

"Witness the hand of said Garrison, and the signature of said Butler, in behalf of the United States, this seventh day of October, A. D. 1861.

"B. F. BUTLER,
"*Maj. Gen'l U. S. A., for the United States.*
"C. K. GARRISON."

12 It is agreed by the United States to accept from C. K. Garrison, the contractor, the long Endfield rifles, with bayonets of the triangular pattern, in place of the sabre bayonet, upon the value conditions as are herein specified.

B. F. BUTLER,
Maj. Gen'l Comd'g.

The alteration of the original agreement, substituting the Endfield rifles for the Liege guns, was made before the time had elapsed for the delivery of the guns, and at the suggestion of Major Strong, Chief of Ordnance of the New England Department; six thousand muskets of the Endfield pattern, with triangular bayonets of good quality, of the description in the contract as amended, were seasonably delivered and inspected, and vouchers were given the claimant by Major Strong, at $27 per gun.

Sometime elapsed after the delivery of the guns before the vouchers were made out, as the guns were subjected to a careful inspection, some being found defective, had to be replaced by others.

Upon the completion of the delivery and inspection of the arms, Major Strong delivered the claimant vouchers of the following tenor, with the approval of Major Gen'l Butler:

[D.]

13 The United States to C. K. Garrison. Dr.

Date of purchase, November 20, 1861.

For 2,800 Enfield muskets, at $27 ..... $75,600 00

REMARKS.

For use in General Butler's division.

I certify on honor that the above account is correct and just; that I purchased the articles above enumerated of the said C. K. Garrison, at the price therein charged, amounting to seventy-five thousand six hundred dollars, and that I have not paid the account.

(Signed) GEO. C. STRONG,
A. A. Gen. and Ordnance Officer.

Received at Boston, Mass., the 26th of November, 1861, of Major Geo. C. Strong, A. A. General and Ordnance Officer United States Army, the sum of seventy-five thousand six hundred dollars in full of the above account.

(Signed) C. K. GARRISON.

No. 25—(*Voucher to abstract D.*)

The United States to C. K. Garrison. Dr.

Date of purchase, December 11, 1861.

For thirty-two hundred (3,200) Enfield rifle muskets, at $27	$86,400 00
For 300 army chests, at $2 50	750 00
	$87,150 00

I certify on honor that the above account is correct and just; that I purchased the articles above enumerated of the said C. K. Garrison, at the price therein charged, amounting to eighty-seven thousand one hundred and fifty dollars, and that I have not paid the account. Orders having been received from the Secretary of War, I have paid twenty dollars each, ($64,750,) the contract price, however, being twenty-seven dollars each.

(Signed) GEO. C. STRONG.
Asst. Adjt. Genl. and Ord. Officer.

Received at Boston, Massachusetts, the 11th of December, 1861, of Major Geo. C. Strong, Assistant Adjutant General and Ordnance Officer United States Army, the sum of sixty-four thousand seven hundred and fifty dollars.

The first voucher, for twenty-eight hundred guns, was paid by the Ordnance Department, at the price of twenty-seven dollars per gun. Twenty dollars per gun only, was paid on the second voucher, of thirty-two hundred guns. The Secretary of War ordering that no more be paid.

14 Prior to the second October, A. D. 1861, in the summer of that year, while the government was in great need of arms for immediate use, they had paid to various persons for similar arms to those delivered by Garrison twenty-seven dollars per gun, and in

a few instances a higher rate. But at, and near the date of the contract, and during its fulfilment, the government bought the same arm at from twenty to twenty-three dollars a piece.

In July, 1861, the Ordnance Department had agreed to receive from Mr. Garrison, ten thousand rifled muskets of the Liege pattern at twenty-seven ($27 00) dollars, to be sent on immediately to Gen'l Fremont, at St. Louis. But he never had any previous contract with the Department for any Enfields of the kind furnished under this contract.

The guns mentioned in the supplement to the contract were delivered in due season, were inspected by an officer of the United States, were accepted, and the vouchers above set forth given to the claimant. We also find that the price of such arms, as paid by the Ordnance Department at the date of the contract, was twenty-three dollars each.

Upon the foregoing facts, the Court held—

First. That by the true construction of the contract and supplement, the United States were to pay to Garrison the same price the Ordnance Department had previously agreed to pay him for guns of like quality and discreption.

Second. Not having any such agreement with the Ordnance Department for guns of the quality or kind delivered, he was entitled to such price for them as the Ordnance Department were paying for similar guns at or about the date of the contract or delivery of the guns.

C. K. GARRISON
vs.
THE UNITED STATES.

I, Sam'l H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled case; the judgment of the Court thereon; the order of the Court allowing an appeal therefrom; and the finding of the facts in said case and the conclusions of law on which the Court founded its judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this second day of November, A. D. 1867.

[SEAL.]

SAM'L H. HUNTINGTON.
Chief Clerk Court of Claims.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

CORNELIUS K. GARRISON
vs.
THE UNITED STATES } No. 143.

E. R. HOAR,
Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

CORNELIUS K. GARRISON
vs.
THE UNITED STATES. } No. 143.

In this case the appellant sought to obtain judgment in the Court of Claims for the sum of $22,400, or $7 apiece on 3,200 Enfield rifles, for which the United States paid him $20 instead of $27 apiece, as the appellant alleged ought to have been paid, in accordance with the terms of his contract. The contract called for 6,000 rifles, and under it the claimant received pay for 2,800 rifles, at the price claimed, $27 apiece.

The ordnance officer was subsequently forbidden by the War Department to pay more than $20 apiece for the remaining 3,200 rifles, and accordingly paid at the latter price. Thus, the 6,000 rifles were paid for very nearly at the price of $23 per rifle.

The original contract bound the United States to pay for Liege rifles with sabre bayonets, &c., "the sum of twenty-seven dollars, or such less sum as the Ordnance Department may have paid for guns like in quality and description, or contracted to pay for to said Garrison."

Subsequently the United States agreed to accept "the long Enfield rifles, with bayonet of the trian-

gular pattern, in place of the sabre bayonet, upon the value conditions'' specified in the contract.

The court found that the Ordnance Department had never contracted to pay Garrison any price for Enfield rifles; that prior to the date of this contract, in the summer of 1861, while the government was in great need of arms for immediate use, the Ordnance Department had paid to various persons for similar arms to those delivered by Garrison $27 per gun, and in a few instances a higher rate; but at and near the date of the contract, and during its fulfilment, the government bought the same arms at from $20 to $23 apiece.

To this state of facts the court applied the contract, construing it as an agreement to pay (1) $27, or (2) "such less sum as the Ordnance Department may have paid for guns like in quality and description'' *to* any *person*, or (3) such less sum as the department had contracted to pay for like arms *to said Garrison*.

Finding no contract to pay Garrison for Enfield rifles, they adopted the price which the department had paid at about the date of this contract to other persons for guns like those which Garrison furnished, namely $23 apiece. Under this construction the court found full payment had been made of the contract price.

This construction was correct.

Whatever authority General Butler had to purchase arms was circumscribed by the limitation in the order of the Secretary of War, that the cost ''should not exceed in the aggregate that of like troops now or hereafter raised for the service of the United States.''

The word ''hereafter'' must be held to refer to the time to elapse between the date of the order and the actual raising of the troops. No other future time would afford any proper standard of comparison of prices.

The limitation in the contract was in execution of

the limitation in the order. General Butler would not agree absolutely to pay $27 apiece for the guns, lest that agreement should result in a transgression of his authority. So he bound the contractor not to exact that sum unconditionally. The contractor agreed to take $27, or a less sum. It is easy to see what that less sum would naturally be, namely, the price which, at that time, the Ordnance Department was paying for like arms, was paying to Garrison, if any; and if not to him, then to other persons, so that the aggregate cost of raising, arming and equipping General Butler's troops should not exceed that of the other troops then raised, or at once to be raised. No other construction gives force to the limitation of authority under which General Butler was acting. None other executes the plain and proper intent of the contracting parties, and gives force to the alternative call for a "*less sum*" than $27.

This also is the only construction which makes no change in the contract price as an inevitable consequence of the change in the kind of arms mutually agreed by the parties. It is a point in the argument for the appellant, that the substitution of the Enfield for the Liege rifles took away the alternative conditions and left only an absolute contract to pay $27 apiece. But this destroys, not preserves, the value conditions of the contract as first executed. Such cannot have been General Butler's intention. He intended to keep within his authority, and that construction should be rejected which carries him beyond its limits. The alternative conditions of the contract should be unaffected by the change of arms mutually agreed upon.

Nor is there any doubt that $23 is the above price which this construction requires to be paid. That was what the Ordnance Department was paying at the date of the contract, the highest price which is proved "in the case; while later in the 'hereafter' therein

mentioned, that is, during the fulfilment of this contract, the price went down to $20."

To this maximum price the court reduced the first payment properly. The contract was an entirety, calling for payment for 6,000 rifles at $23 apiece. The account stood open till the whole were paid for.

E. R. HOAR,
Attorney General.

Supreme Court of the United States.

DECEMBER TERM, 1868.

E. K. GARRISON, Appellant,

VERSUS

THE UNITED STATES, Appellees.

APPELLANT'S BRIEF.

T. J. D. FULLER,
For Appellant.

McGILL & WITHROW, PRINTERS.

Supreme Court of the United States.

E. K. GARRISON, APPELLANT,

vs.

THE UNITED STATES, APPELLEES.

APPELLANT'S BRIEF.

The questions arising out of this record are—

1st. Whether the contract between the parties, set out in the record, *fixed a price for the guns?*

10 Bingham, p. 376; do., p. 482; 4 C. B., p. 837.

2d. In the event that the contract fixed no price, whether the rule adopted by the court for determining the measure of damages in a contract without any fixed value is the true one?

2 Saunders' Rep., 121, E. N. 2, Webber *vs.* Tirill.

And

3d. Whether, after determining the measure of value to be three dollars per gun more than was paid, the court could *recoup* from a former specific delivery and specific payment for so many guns voluntarily made, for the purpose of offsetting the balance found due the claimant under the rule adopted?

The court below held that the contract did not fix the price for the articles delivered. In this conclusion of the court the appellant alleges there is error.

The contract of the 7th of October is an executory one; the articles were seasonably *delivered*, *inspected*, and *accepted*, and regular vouchers given. There is no allegation or pretence of any failure on the part of the appellant in the performance of this executory agreement on his part.

As to the appellant, by the delivery and acceptance of the guns the contract became an executed one, and nothing remained to be done but the payment of the price.

To recover this, the appellant need not declare upon the special contract even. All that remained to be done was the payment of the price—a duty to be performed; and the common counts would be an appropriate form of action for the recovery of the price after delivery.

There can arise no question that the original contract, as it stood, before the endorsement was made, coupled with the fact, specially found by the court, that the Ordnance bureau, prior to the making of the contract, had agreed to pay Garrison $27 for Liege guns, was an executory contract for the delivery of guns, *with a price fixed.* Indeed, the court below so held.

Then, at one time there was a contract, without ambiguity for a fixed price.

Did the parties design to alter their contract in that particular, and so change it as to convert it from one of a fixed price, into one without any fixed price?

Now, it is affirmed, *if no endorsement had been made upon the contract*, and the appellant had delivered, and the United States had accepted, the Enfield guns with the triangular bayonet, for the siege guns with the sabre bayonets, with a full knowledge of the fact, and from a preference for the one arm over the other, in the satisfaction and discharge or fulfillment of the contract, the United States would be bound in law to pay the price fixed for the Liege guns, notwithstanding guns of another pattern were delivered.

It is an important provision of this contract, that Garrison bound himself, in case of failure on his part to reasonably comply with his stipulations, that the United States, the other contracting party, might procure the guns elsewhere, and charge him with any excess above the contract price it might have to pay.

The court found no difficulty in determining the meaning of the original contract, and also found the fact to be that the Ordinance bureau had agreed to pay the petitioner $27 for guns of the Liege pattern, prior to the making of the contract in question.

The court says: "*In July*, 1861, *the Ordinance department had agreed to receive from Mr. Garrison* 10,000 *rifled muskets of the Liege pattern at* $27, *to be sent to General Fremont, at St. Louis. But he never had any previous contract with the department for any Enfields of the kind furnished under this contract.*"

Hence it follows, that if "Liege" guns had been delivered instead of "Enfields" no question could be made of the right of the claimant to recover $27 for each gun delivered. The fact found by the court made the contract price certain—made that certain which before was uncertain.

It is fair to presume, that at the date of the contract, to wit, October 7, 1861, the fact of what sum the Ordnance department had previously agreed to pay the petitioner was known to him, but might not have been known to General Butler. Hence the peculiar phraseology of the contract: "*And the United States contracts and agrees to pay for each and every of said rifles with sabre bayonet and appendages complete, as shall pass inspection, the sum of twenty-seven dollars, or such less sum as the Ordnance department may have paid for guns like in quality or description, or contracted to pay for to said Garrison.*" It is not the meaning of the contract what the United States had paid, or had agreed to pay, *to any other person* than Garrison; but the contingency of a deduction from the $27, the price named to be paid, was made to depend solely upon the past negotiations, known to one of the contracting parties but not known to the other; and the contingency was introduced out of abundant caution, by the agent of the United States. General Butler doubtless reasoned in this way: I can with safety agree to pay for these guns what the Ordnance bureau has agreed to pay, if it was $27, as Mr. Garrison represents; then, I am within the limit of my instructions, and have a precedent. Furthermore, the words in the contract, "may have paid for guns like in quality or description," do not refer to any purchase from any other person then Garrison, is rendered quite certain; otherwise, the court below could not have arrived at the conclusion, that if "Liege" guns had been delivered, the claimant would be entitled to the $27. Otherwise, the Government might refuse to pay even that sum, because it had bought of some other person at a less price; a construction which is not contended for even.

It is an important fact, to be kept in view in construing this contract, that the minds of the contracting parties had agreed and fixed upon a price—a basis of future liability—to wit, the sum of $27 per gun, to be varied, however, only upon the single contingency named, to wit, what had been *paid*, or what had been *agreed* to be paid, by the Ordnance bureau to said Garrison. For in the latter part of the contract a very important stipulation is introduced, that, in case of failure on the part of said Garrison to comply

with the terms of the contract, General Butler was at liberty to supply himself with the arms elsewhere at the cost of said Garrison.

If a greater sum should be paid than $27, said Garrison was bound to make it good to the United States. In any such contingency, the price named in the contract would be the basis of future settlement.

Having stated the petitioner's construction of the first or unamended contract, does the alteration of it vary the compensation to be paid?

In reference to the *alteration*, the court find the facts to be, that the *alteration* was made before the time had elapsed for the delivery of the guns, and it was made at the suggestion of Major Strong, chief of ordnance of the New England department. The substituted gun and bayonet were seasonally delivered and inspected, and the regular vouchers were thereupon delivered to the claimant. The court below, we say, erred in their construction of the amendment, in this: that in changing the *arm*, it changed the rate of compensation, or the mode of ascertaining it.

The United States agree to *accept* from the contractor the long Enfield rifles, with bayonets of the triangular pattern, in place of the sabre-bayonet, "*upon the value conditions as are herein specified.*" In other words, *upon the same value conditions.* The plain, natural meaning of the language of the *alteration* in the contract is, "I will accept Enfield rifles with triangular bayonets, instead of siege rifles with sabre-bayonets, at the same price—the one for the other."

The question of the relative value of the two arms, or the relative expense of the two arms, was not considered by the court, nor does the case disclose any evidence on that subject.

The proposed change enanated from the Government, upon the advice of an expert—an ordnance officer; and the presumption is, that the change was for the interest and benefit of the Government, and that the substituted arm was preferable to the one originally agreed to be delivered.

The Government possessed the power to compel the petitioner to furnish the arm first contracted for. If he refused to do it, the Government could procure them, at his expense, under the contract. The Government preferred the one delivered to the one first agreed to be delivered.

And there is no ground for supposing the Government was wronged or defrauded in the substitution.

The error of the court below, it is respectfully urged, consisted in holding that the change of the arm necessarily

changed the *rate* or mode of compensation. Whereas, by the true construction of the amendment, it simply substituted one kind or description of arm for another, without changing the compensation named, or the mode of fixing it.

There was then no uncertainty about the contract, or its measure of compensation at a fixed price. What did the contracting parties mean by the language used? For this purpose, Major Strong and General Butler were the United States. The vouchers given at the very time of the transaction abundantly attest what the parties understood to be the true meaning of the alteration.

The vouchers were given at the time of the completion of the delivery and inspection of the arms. The first voucher bears date November 20, 1861, and is for 2,800 Enfield muskets, at $27 per gun, and was paid without objection by the Government.

The second voucher bears date December 11, 1861, for 3,200 guns, at $27 per gun, and is certified to, in form, like the first voucher, with the addition of the words, "*I have not paid the account, orders having been received from the Secretary of War. I have paid twenty dollars each*, THE CONTRACT PRICE, HOWEVER, BEING TWENTY-SEVEN DOLLARS EACH."

There can be no mistake, from this language, how Major Strong understood the contract. Between the dates of the two vouchers, the orders of the Secretary of War had been received, and Major Strong, knowing that here was a violation of a plain and positive agreement, which he was compelled to disregard by the order of his superior officer, obeys the order; but, like an honest man, states the facts about the terms of the agreement, as he and the contractor understood it to be at the time it was made. He naturally felt, that as he solicited the change of the bayonets for the benefit of the service, before the arms were delivered, and when it was in the power of the contractor to have insisted on a literal performance of the original contract, to induce him to change it, and then to withhold from him the agreed compensation, in consequence of the change, would be a fraud and a snare upon him, and was what he felt unwilling to be a party to.

It cannot be urged, that Major Strong and General Butler did not act in the most perfect good faith in this matter towards the United States. They had the deepest personal interest in the success of the enterprise upon which they had embarked, the success of which, in a great measure, depended upon the superiority and efficiency of the arms used for the troops under their command.

The court below not only misinterpreted the meaning of the contract, but it adopted a rule for estimating the value of the guns delivered different from the one plainly prescribed in the contract. By the contract, it was to be $27, or such less sum as had been paid, or had been agreed to be paid, to Garrison.

Now, if no sum had been paid, or agreed to be paid, other than the one expressed, then $27 would be the price to be paid. The contract afforded that light in itself. But where in the contract can it be found that "the Government was to pay Garrison the same price *it was paying to other parties about that time*," which may be as well after as at the time of the date of the contract.

In other words, the court held the contract void for ambiguity and uncertainty, and that the contractor could only recover upon a *quantum meruit*, and that he had actually received all that he was entitled to recover.

The rule for construing contracts is laid down by this court in 5 Wall, 689, Nash *vs.* Towne: "That it will place itself in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words, and of the correct application of the language to the things described."

The court will not only look to the language employed, but the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties enjoyed when the contract was executed.

Barreda *vs.* Silsbee, 21 How., 147.

Now, viewing this transaction in the light of this direction, it is apparent that the court below construed this contract entirely different from what the parties to it understood it to mean at the time of its execution.

The voucher of Major Strong very clearly shows what he understood it to mean—that his construction of it concurred with the claimant's construction of it. General Butler's understanding was the same also.

The arbitrary order of the War Department to Major Strong, to pay only $20 for the guns, had no reference whatever to the legal construction of the contract or its true meaning.

The court certify the fact, that at or about the time of the making of the contract, the War Department were paying $23 for guns of the Enfield pattern. So it would appear, by the order given to Major Strong, the War Department was not governed by the contract, or by the price paid at this time.

How Major Strong and General Butler construed the amended contract is plain and distinct, from the sum the voucher was made out for, and the explicit declaration appended to it after the reception of the order of the Secretary of War.

Furthermore, that the claimant understood the contract in the same way, I think, can be made apparent from the contract itself and the surrounding circumstances.

The claimant had a contract with the Ordnance department for these guns, at $27, when he met General Butler. It is a matter of historical evidence at this time of the great scarcity of arms in the country. There were more men in the field than arms could be procured to place in their hands. Foreign markets were resorted to for a supply. General Fremont in the West, General McClellan on the Potomac, Generals Butler and Burnside, were organizing their expeditions—their ultimate points of destination a secret. Extraordinary and discretionary powers were conferred upon these officers. Time was an important element. The success of their expeditions was dependent upon the celerity of fitting out, arming, and equipping these expeditions. Importations of arms from the various armories in Europe, where they might be obtained, were arriving frequently, stimulated no doubt by motives of gain, as well as patriotic ones.

General Butler, by the promise of ready cash payment, induced the claimant to enter into the contract of the 7th of October, 1861. Neither the Ordnance bureau or the Government purchasing-agent in New York could answer General Butler's requisitions for arms. They were not in the country, and not to be had. Garrison must have known the terms of his own previous agreement with the Ordnance bureau. General Butler was authorized by the written order of the Secretary of War, and the written endorsement of the President, to raise, organize, arm, and equip 6,000 men for his gulf expedition.

Under this state of facts and surrounding circumstances, the first contract is made. The United States agree to pay $27 per gun, but then follows the qualification, or such less sum as the Ordnance department had paid, or had agreed to pay, said Garrison. Garrison would naturally wish to fix the price he was to receive as a commercial transaction. To him the contract, when made, the price he was to receive, was a known certainty. It was not necessarily so to General Butler. He wished to guard himself by the restriction in his authority from the President and Secretary of War. Hence the *proviso* in the contract.

Now, as the importations of arms were daily arriving, and experience and knowledge was being acquired in the superiority of one kind or pattern of arm over another, the triangular bayonet was believed by Major Strong and General Butler to be preferable to the more heavy and cumbersome *sabre* bayonet. Hence the substitution and alteration of the contract. I argue so, and think I have a right to, because the case shows that the proposition for the change came from the United States, and was for its interest. To this alteration the claimant assents, BUT UPON UNCHANGED VALUE CONDITIONS! In the construction of this alteration by the court below, it makes the claimant give up a certainty for an uncertainty, throw the price per gun upon the unknown price the Secretary of War was paying to different contractors, or upon the still greater uncertainty of a *quantum valebat* or *quantum meruit!*

I argue this would be an unwise and indiscreet act upon the part of the claimant, and extremely improbable; on the other hand, he might not object to the desired change of arm, but naturally would want to retain his former price. Would he wish to relinquish a certainty for an uncertainty? On the other hand, would not his interest lead him to hold on to his agreement, when he knew what he was to receive under it? He knew that he never had any agreement with the Ordnance bureau about *Enfield rifles;* and when he consented to deliver *Enfield rifles* in lieu of *Liege rifles*, upon the "*same value conditions*," did he not suppose the words "*value conditions*" meant value conditions of the Liege guns, which he knew existed, or of "*value conditions* of Enfield guns, which he knew had no existence whatever? Did he not understand and interpret the alteration to mean, if upon the "*value conditions*" in the first contract I am to receive $27, if it shall be so determined? then I am to receive the same price for these guns of the *Enfield pattern?*

Is not this the ordinary, first-blush meaning of the contract? Is not the other and opposite construction a *subtle, refined,* and artificial one? The one construction makes the contract intelligible and capable of execution; the other makes it absurd and incapable of execution, and manifestly different from the understanding of the parties. The one construction makes the contract void for ambiguity and uncertainty; the other makes it intelligent and capable of execution. It makes the parties place themselves in the absurd and contradictory condition of not doing what they were seemingly trying to do. The question is purely one of intention, and not of illegality or of prohibition.

Again: I maintain the court below, if they were right in their construction of the meaning of the contract, were wrong in their law, or conclusion of law.

If the meaning of the court is correctly appreciated, the contract and alteration, when taken together, means precisely what it would if the words "*the long Enfield rifles with bayonets of triangular pattern*" were inserted in the original contract, and the words "*Minnie rifles of the Liege pattern with sabre bayonets*" were expunged, omitting the contingency.

Now, then, supposing the contract so to read, and the fact being as the court find it to be, that Garrison never had any contract or negotiations whatever with the Ordnance department about "*Enfield guns with triangular bayonets,*" upon the delivery and acceptance of the guns, and refusal to pay, what would be the measure of damages?

Would it not be $27 dollars? If the promise is to pay a certain sum named, or a less sum, upon a condition or a contingency, the condition or contingency not existing, then the price named is the sum fixed, and is the necessary measure of damages.

If the party promising promises to pay a certain sum mentioned, or a less sum upon certain facts appearing, and the exception is not shown as a matter of defence, the promise is good for the sum first named. A condition or proviso for the benefit of the promisor not appearing or not existing, is void and of no effect.

II.

This contract, when first made, and before the "*amendment*" or "*alteration*" was attached to it, or incorporated into it, was what the law terms an *executory agreement*, for the delivery of articles *at a fixed price.*

III.

After the delivery and acceptance of the arms, it became what the law terms a *contract executed.* Of the execution of the contract, upon the part of the claimant, no question is made by the defendant.

The dispute arises about the amount of the consideration to be paid.

Was there a sale of arms for a price stipulated or agreed to be paid, or was it a sale without any price named?

The authorities say, when the price is agreed upon, there can

arise no question; and if no price be named, the law implies a promise to pay "*what the thing is reasonably worth.*"

But the price of goods sold may be determined by other means. It may be fixed by *valuers*, by the terms of the contract, to be appointed by the parties; and, when fixed by the *valuers*, it is equivalent to an agreement of the parties.

The court below arrived at the conclusion here was no fixed or agreed price!

Then, instead of adopting the rule of law, that the Government should pay what the arms were reasonably worth at the time of their delivery and acceptance, it adopted the rule or measure of value that the Government should pay what the Ordnance department were paying about the time of the delivery.

This is a different measure from what the law prescribes.

IV.

The payment of $27 for the first lot of guns delivered was a voluntary payment, and in execution and discharge of the contract *pro tanto*, and the payment is binding and conclusive upon the Government. *The payment was not made upon general account of arms delivered*, but a full payment for a specific number delivered. The price paid was no more a subject of readjustment than the arms were.

The court found the fact to be, that the last lot of 3,200 guns delivered were worth $23 per gun; but as the War Department had paid only $20 per gun, the claimant was entitled to recover $3 additional on each gun for the last delivery, which would amount to $6,600.

The claimant was entitled to judgment for this sum upon the court's own hypothesis.

The court had no authority to go back of what the Government had paid, and *recoup* or make reclamation of the consideration previously paid. It was a voluntary payment on the part of the Government, with a full knowledge of all the facts. The delivery and payment of 2,800 guns was a liquidation and execution of so much of the contract.

The Government might, perhaps, have refused payment of a part before the whole number of guns contracted for had been delivered. But, having accepted and paid for part, and so made of an entirety a divisability, it is estopped from undoing what had been consummated and concluded, and equally so were the court.

Again: The case finds, "that the first voucher for 2,800 guns was paid by the Ordnance department at the price of $27 per gun." That $20 per gun only was paid on the second voucher of 3,200 guns: the Secretary ordering that no more be paid.

The giving the voucher by Colonel Strong, and the payment of it by the Ordnance department, the head of the bureau for purchasing arms, merged the first contract in this new one; was an authorative construction of the contract, and settlement of it, like the giving a note in payment of a bill of goods.

The order of the Secretary of War was without any authority; it being arbitrary, after the arms had been delivered, without any reference to the construction of the contract. Has no effect.

The claimant might have declared upon his voucher for 3,200 guns, ignoring the previous contract altogether. It would make out a *prima facie* case on his part.

T. J. D. FULLER.